

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION**

<p>SLB Milbank, LLC, Plaintiff, vs. Wapiti Medical Group Limited Company, Defendant.</p>	<p>Case No. <u>1:24-cv-1003</u> COMPLAINT</p>
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COMES NOW the Plaintiff, SLB Milbank, LLC (“Plaintiff” or “SLB”), and for its cause of action against the Defendant (“Defendant” or “Wapiti”), states and alleges as follows:

1. Plaintiff SLB Milbank, LLC is a Kentucky limited liability company with a principal place of business located at 231 S 5th St Ste 200, Louisville, KY, 40202.
2. Defendant Wapiti Medical Group Limited Company is a South Dakota limited liability company, existing under the laws of the State of South Dakota, with a principal place of business located at 107 Flynn Drive, Ste. 600, Milbank, SD 57252.
3. The amount in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and this complaint is between citizens of different states.
4. The court has jurisdiction over this action pursuant to 28 U.S.C. § 1332.
5. Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1391 because Defendant leases property and conducts business in this District, and/or is subject to personal jurisdiction in this District.

GENERAL ALLEGATIONS

6. Plaintiff incorporates the preceding paragraphs by reference.

7. Plaintiff owns certain real estate located in the City of Milbank, County of Grant, South Dakota, commonly known as 107 Flynn Drive (the “Property”) and more particularly described in Exhibit A. *See Exhibit A, Legal Description of Real Property.*
8. On or about March 21, 2014, Defendant entered into a lease agreement (the “Lease”) with Milbank Insurance Company to lease three thousand (3,000) square feet of the sixth (6th) floor of the Property to be used for office space. *See Exhibit B, March 21, 2024 Lease Agreement.*
9. On or about January 14, 2015, Defendant entered into the “First Lease Amendment” to the Lease with Milbank Insurance Company. *See Exhibit C, January 14, 2015 First Lease Amendment.*
10. On or about January 9, 2017, Defendant Entered into the “Second Lease Amendment” to the Lease with Milbank Insurance Company. *See Exhibit D, January 9, 2017 Second Lease Amendment.*
11. The Second Lease Amendment expanded the demised premises from three thousand (3,000) square feet to six thousand (6,000) square feet of the sixth (6th) floor of the Property (hereinafter the “Leased Premises”). *See Exhibit D.*
12. The Second Lease Amendment extended the lease term through March 31, 2024. *See Exhibit D.*
13. The Second Lease Amendment contains rental amounts as follows:
 - a. March 1, 2017 – March 31, 2017: \$6,400.00 per month (\$12.80/SF);
 - b. April 1, 2017 – March 31, 2019: \$6,800.00 per month (\$13.60/SF);
 - c. April 1, 2019 – March 31 2021: \$7,200.00 per month (\$14.40/SF);
 - d. April 1, 2021 – March 31, 2023: \$7,600.00 per month (\$15.20/SF);
 - e. April 1, 2023 – March 31, 2024: \$8,000.00 per month (\$16.00/SF).

See Exhibit D.

14. On or about January 12, 2020, Plaintiff purchased the Property from Milbank Insurance Company. *See Exhibit E*, Recorded Deed for Property.
15. On or about January 12, 2020, and in consideration for the purchase of the Property, Milbank Insurance Company duly assigned the Second Lease Amendment to Plaintiff. *See Exhibit F*, Assignment and Assumption of Leases and Contracts agreement.
16. The sixth (6th) floor of the Property consists of approximately ten thousand eight hundred sixty-eight (10,868) square feet, of which approximately ten thousand two hundred twenty-six (10,226) square feet are rentable.
17. Article XIX, Section 1 of the Lease states: “Lessor agrees that Lessee shall have the right of first refusal to lease any available adjacent space on the sixth floor (“Available Space”).” *See Exhibit B*, p. 7.
18. Article XIX, Section 1(a) of the Lease states: “In the event Lessee desires to lease all or part of the Available Space, Lessee will give written notice to Lessor which shall include the location of and number of square feet of Available Space and the term that Lessee desires. If such terms are acceptable to Lessor, Lessor and Lessee shall execute an amendment to this Lease reflecting such terms.” *See Exhibit B*, p. 7.
19. Article IX (Alterations) of the Lease states: “Lessee may not during the term of this Lease make changes or improvements to the demised premises unless Lessor consents in writing to the changes or improvement, before any work is commenced.” *See Exhibit B*, p. 4.
20. Upon information and belief, prior to Plaintiff purchasing the Property, Defendant Wapiti made extensive renovations to the sixth (6th) floor of the Property. These renovations

include, but are not limited to, the construction of walls and appurtenances desired by Defendant.

21. Defendant failed to request and obtain written consent from Milbank Insurance Company for the construction of the walls and appurtenances.
22. The illicit construction of walls and appurtenances obstructed the design-load airflows of the recessed HVAC systems on the sixth (6th) floor plenum, a fact acknowledged by Defendant.
23. The obstructions to the design-load airflows caused Plaintiff to have to spend additional sums on heating and cooling in the sixth (6th) floor, as well as providing temporary space heaters to Defendant.
24. From 2020 through 2022, without prior consent or notice, Defendant began utilizing the remaining four thousand two hundred twenty-six (4,226) square feet (hereinafter the “Available Space”). During this period, Defendant set up conference tables for large meetings, work areas, and installed storage for documents, files, office equipment and supplies in the Available Space.
25. In 2022, pursuant to Article XIX, Section 2 of the Lease, Defendant requested the use of a collection of cubicles owned by Plaintiff. Defendant was entitled to use the cubicles owned by Plaintiff during the term of the Lease, however, they remain property of Plaintiff. *See Exhibit B.*
26. In 2022, without prior consent or notice, Defendant erected these cubicles in the Available Space.
27. Defendant utilized the newly constructed cubicles as additional office space.

28. Upon information and belief, Defendant utilized the newly constructed cubicles to add additional employees to the sixth (6th) floor of the Property.
29. At no time did Defendant provide notice to Plaintiff of its intention to occupy any portion of the Unleased Portion of the sixth floor, i.e., Available Space, as required pursuant to Article XIX, Section 1(a) of the Lease.
30. Defendant has failed to pay additional rent to Plaintiff for utilizing the Available Space.
31. Defendant's utilization of the Available Space has caused Plaintiff to expend additional costs to heat and cool the unleased space, has caused additional wear and tear upon the unleased portion of the Property, and additional wear and tear upon the common areas of the Property, including but not limited to, parking lots, elevators, lobbies, and restrooms.
32. Defendant's utilization of the Available Space precluded Plaintiff from leasing the same to an additional tenant, or requiring Defendant to exercise its Right of First Refusal.

COUNT I
BREACH OF CONTRACT

33. Plaintiff incorporates the preceding paragraphs by reference.
34. Defendant's Lease and subsequent amendments thereto allowed Defendant to lease six thousand (6,000) square feet from Plaintiff.
35. In consideration for entering into the Lease, Defendant was to pay to Plaintiff monthly rental payments as described *supra*.
36. Defendant breached the Lease as follows:
 - a. Defendant failed to notify Plaintiff of Defendant's desire to lease all or part of the Available Space as required under Article XIX, Section 1(a) of the Lease;

- b. Defendant failed to present Plaintiff with a rental term desired by Defendant for the use of the Available Space as required by Article XIX, Section 1(a) of the Lease;
- c. Defendant constructed enclosed office spaces both in the Leased Space and the Available Space without obtaining prior approval of Plaintiff;
- d. Defendant utilized the Available Space of the Property for storage and exercise;
- e. Defendant constructed office cubicles and meeting spaces within the Available Space;
- f. Defendant utilized the Available Space to allow more employees to work in the Property.

37. Due to Defendant's breach of the Lease, Plaintiff has suffered damages.

COUNT II
UNJUST ENRICHMENT

38. Plaintiff incorporates the preceding paragraphs by reference.

39. Defendant utilized the Available Space, approximately four thousand two hundred twenty-six (4,226) square feet that Defendant was not entitled to pursuant to the Lease.

40. Defendant had actual knowledge that Defendant was not entitled to utilize the Available Space without compensation to Plaintiff.

41. Defendant had actual knowledge that if Defendant intended to utilize the Available Space, Defendant was to present a rental term to Plaintiff and negotiate a separate amendment to the Lease with Plaintiff.

42. Defendant has used the Available Space since at least 2020 for the benefit of Defendant. Defendant has knowledge of the benefit conferred upon it by Plaintiff.

43. Defendant failed to compensate Plaintiff for Defendant's use of the Available Space, and have accepted or retained the benefit.
44. Defendant has been unjustly enriched by using the Available Space without adequately compensating Plaintiff. It would be inequitable for Defendant to retain the benefit conferred upon it by Plaintiff without paying fair value for it.
45. Due to Defendant's unjust enrichment, Plaintiff has suffered damages.

COUNT III
TRESPASS UPON REAL PROPERTY

46. Plaintiff incorporates the preceding paragraphs by reference.
47. Defendant is entitled to utilize the common areas of the Property along with the Leased Premises, totaling six thousand (6,000) square feet.
48. Defendant entered onto the Available Space, an area of the Property owned by Plaintiff that Defendant was not entitled to enter.
49. Defendant utilized and is now still using the Available Space without the approval of Plaintiff.
50. Defendant utilized and is now still using the unleased portion of the sixth floor to the benefit of the Defendant.
51. Due to Defendant's trespass, Plaintiff has suffered damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment against the Defendant, Wapiti Medical Group Limited Company, in that this Court grant the following relief:

- A. Award Plaintiff damages in an amount to be proven at trial, but in excess of \$75,000.00, for Defendant's Breach of Contract, Unjust Enrichment, and Trespass;
- B. Order Defendant to vacate the unleased portion, i.e., Available Space, of the Property;

C. Award Plaintiff its costs and disbursement of this action, including reasonable attorney fees; and

D. Award Plaintiff such other relief as the Court deems just and equitable.

Dated this 15th day of February, 2024.

MYERS BILLION, LLP

By: /s/ Berkley F. Fierro

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The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

SLB Milbank, LLC

(b) County of Residence of First Listed Plaintiff Jefferson County, KY
(EXCEPT IN U.S. PLAINTIFF CASES)(c) Attorneys (Firm Name, Address, and Telephone Number)
Steven J. Morgans and Berkley F. Fierro
230 S. Phillips Ave., Ste. 300, Sioux Falls, SD 57104
605-336-3700**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF	PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4 <input checked="" type="checkbox"/> 4
Citizen of Another State	<input checked="" type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input checked="" type="checkbox"/> 5 <input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 375 False Claims Act
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 330 Federal Employers' Liability	INTELLECTUAL PROPERTY RIGHTS	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	PERSONAL PROPERTY	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 835 Patent - Abbreviated New Drug Application	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 160 Stockholders' Suits	REAL PROPERTY	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 880 Defend Trade Secrets Act of 2016	<input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692)
<input checked="" type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 385 Property Damage Product Liability	SOCIAL SECURITY	<input type="checkbox"/> 485 Telephone Consumer Protection Act
<input type="checkbox"/> 195 Contract Product Liability	<input type="checkbox"/> 362 Personal Injury - Medical Malpractice	LABOR	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 196 Franchise		<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 850 Securities/Commodities/ Exchange
		<input type="checkbox"/> 720 Labor/Management Relations	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 890 Other Statutory Actions
		<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 891 Agricultural Acts
		<input type="checkbox"/> 751 Family and Medical Leave Act	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 893 Environmental Matters
		<input type="checkbox"/> 790 Other Labor Litigation		<input type="checkbox"/> 895 Freedom of Information Act
		PRISSONER PETITIONS	FEDERAL TAX SUITS	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)
		Habeas Corpus:	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 896 Arbitration
		<input type="checkbox"/> 463 Alien Detainee		<input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision
		<input type="checkbox"/> 510 Motions to Vacate Sentence		<input type="checkbox"/> 950 Constitutionality of State Statutes
		<input type="checkbox"/> 530 General		
		<input type="checkbox"/> 535 Death Penalty		
		Other:		
		<input type="checkbox"/> 540 Mandamus & Other		
		<input type="checkbox"/> 550 Civil Rights		
		<input type="checkbox"/> 555 Prison Condition		
		<input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement		

V. ORIGIN (Place an "X" in One Box Only)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from Another District (specify) _____	<input type="checkbox"/> 6 Multidistrict Litigation - Transfer	<input type="checkbox"/> 8 Multidistrict Litigation - Direct File
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Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. Sec. 1332; 28 U.S.C. Sec. 1391**VI. CAUSE OF ACTION**Brief description of cause:
Breach of contract related to lease agreement, failure to pay amounts due for rental space occupied, and ejectment.**VII. REQUESTED IN COMPLAINT:** CHECK IF THIS IS A CLASS ACTION
UNDER RULE 23, F.R.Cv.P.**DEMAND \$**
>\$75,000.00CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE N/A

DOCKET NUMBER _____

DATE

2/15/2024

SIGNATURE OF ATTORNEY OF RECORD

Berkley Fierro

FOR OFFICE USE ONLY

RECEIPT # _____

AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG. JUDGE _____